

Exhibit B

Deposition of Robert M. Fishman

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

-----X

IN RE: PROMESA
Title III

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO, No. 17 BK 3283-LTS
as representative of
(Jointly
THE COMMONWEALTH OF PUERTO RICO, Administered)
et al,

Debtors.

-----X

IN RE: PROMESA
Title III

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO RICO, No. 17 BK 3284-LTS

as representative of

PUERTO RICO SALES TAX FINANCING
CORPORATION (COFTA)

Debtor.
-----X

DEPOSITION
OF
ROBERT M. FISHMAN, ESQ.
Thursday, January 10, 2019
101 Park Avenue
New York, New York

Reported by:
AYLETTE GONZALEZ, RPR, CLR, CCR
JOB NO. 153834

Page 2

1

2 DATE: January 10, 2019

3 TIME: 1:30 p.m.

4

5

6 Deposition of ROBERT M. FISHMAN, ESQ.,
7 held at the offices of CURTIS,
8 MALLET-PREVOST, COLT & MOSLE, LLP., 101 Park
9 Avenue, New York, New York 10178, pursuant
10 to NOTICE, before AYLETTE GONZALEZ, a
11 Registered Professional Reporter, Certified
12 LiveNote Reporter, Certified Court Reporter
13 and Notary Public of the States of New York
14 and New Jersey.

15

16

17

18

19

20

21

22

23

24

25

1

2 A P P E A R A N C E S:

3

4 CURTIS, MALLET-PREVOST, COLT & MOSLE

5 Counsel for Ambac Assurance

6 101 Park Avenue

7 New York, New York 10178

8 BY: MICHAEL MOSCATO, ESQ.

9 BY: GABRIEL HERTZBERG, ESQ.

10 BY: JACOB KEARNEY, ESQ.

11

12

13

14 KASOWITZ BENSON TORRES

15 Counsel for Whitebox Multi-Strategy

16 Partners, L.P.

17 1633 Broadway

18 New York, New York 10019

19 BY: TREVOR WELCH, ESQ.

20

21

22

23

24

25

1

2 A P P E A R A N C E S: (CON'T)

3

4 REED SMITH

5 Counsel for Bank of New York Mellon

6 599 Lexington Avenue

7 New York, New York 10022

8 BY: LOUIS SOLOMON, ESQ.

9 BY: C. NEIL GRAY, ESQ.

10

11

12

13 ALSO PRESENT:

14 HOLWELL SHUSTER & GOLDBERG

15 BY: BRENDON DeMAY, ESQ.

16

17

18

19

20

21

22

23

24

25

1

2 R O B E R T M. F I S H M A N ,

3 called as a witness, having been

4 duly sworn by a Notary Public,

5 was examined and testified as

6 follows:

7 EXAMINATION BY

8 MR. HERTZBERG:

9 Q. Good afternoon, Mr. Fishman. My
10 name is Gabe Hertzberg. I'm from the law firm
11 Curtis, Mallet-Prevost, Colt & Mosle, the law
12 firm where we're sitting today. Thank you for
13 being here.

14 Have you been deposed before?

15 A. I have been deposed several times
16 before.

17 Q. How many times have you been
18 deposed?

19 A. Three times are coming to mind over
20 40 years, but there could be more. Those are
21 the three that I'm remembering right now.

22 Q. In those instances were you deposed
23 in your capacity as an expert witness or as a
24 regular witness?

25 A. Once as an expert, once as a fact

1 ROBERT M. FISHMAN (1/10/19)

2 witness and one is kind of hard to describe
3 what exactly that role was.

4 Q. Tell me about the time that you
5 were deposed as an expert.

6 A. It involved -- a long time ago. It
7 involved a dispute that called into play
8 commonality between U.S. bankruptcy law and
9 Mexican bankruptcy law. And there was a
10 question about whether a U.S. Court could
11 grant certain relief and they needed testimony
12 about how a U.S. Court would decide if it
13 could do what U.S. law required or if it
14 needed to do what Mexican law required.

15 Q. What year was that, approximately?

16 A. 1990s. I'm not sure.

17 Q. And were you an expert on U.S.
18 bankruptcy law?

19 A. Yes.

20 Q. What facet of U.S. bankruptcy law
21 were you hired as an expert for?

22 A. I don't know that it was narrow. I
23 think it was probably a sort of generally
24 speaking. I don't -- you know, the case was a
25 long time ago, I can't really recall the

1 ROBERT M. FISHMAN (1/10/19)

2 specific controversy or the issue that was
3 involved in the underlying dispute.

4 Q. Was that the last time you were
5 hired as an expert witness?

6 A. It was not the last time I was
7 hired, but it was the last time I was deposed.

8 Q. Have you given testimony in court
9 as an expert witness?

10 A. I have never given testimony as an
11 expert witness unless we can figure out what
12 to call that hybrid I described, which maybe
13 it was an expert witness and maybe it wasn't,
14 I don't know.

15 Q. Why don't you say a little more
16 about it.

17 A. It was in the Tolson case in the
18 early 1990s, and it involved testimony about a
19 settlement between the debtor and the bank
20 group of a series of fraudulent conveyance and
21 related kinds of disputes. And the
22 investigation that was conducted to support
23 the settlement was an issue in controversy and
24 I was a witness on that topic. And I don't
25 know whether you'd call that an expert witness

1 ROBERT M. FISHMAN (1/10/19)

2 or not, but I was a witness.

3 Q. You're an expert witness -- or
4 you're here today in your capacity as an
5 expert witness, correct?

6 A. Yes.

7 Q. How do you understand the nature of
8 your retention?

9 A. I'm not sure exactly what you mean
10 by that.

11 Q. What is your area of expertise in
12 this matter?

13 A. I see. Well, I have been a fee
14 examiner in a number of cases, and I believe
15 that it is the combination of my general
16 experience as a bankruptcy lawyer and my
17 experience as a fee examiner that gives rise
18 to the notion that I am an expert.

19 Q. In your report --

20 MR. HERTZBERG: Which I will ask
21 the reporter to mark and I'll hand you
22 a copy, sir.

23 (Fishman Exhibit 1, Declaration of
24 Robert M. Fishman was marked for
25 identification, as of this date.)

1 ROBERT M. FISHMAN (1/10/19)

2 BY MR. HERTZBERG:

3 Q. So your report has been marked as
4 Fishman 1, and you have that in front of you,
5 correct?

6 A. Yes, I do.

7 Q. In your report you identify two
8 prior matters in which you worked as a fee
9 examiner, one of those is the Chapter 9 case
10 of Detroit?

11 A. Correct.

12 Q. Another one is the bankruptcy
13 arising out of the Petters' Ponzi scheme,
14 right?

15 A. Correct.

16 Q. And are there any other matters in
17 which you have worked as a fee examiner?

18 A. I believe the report also discusses
19 my fee examinership in Velocity Holdings.

20 Q. Are there any other, other than
21 those three?

22 A. No.

23 Q. In the Detroit matter, were you the
24 only fee examiner in the case?

25 A. Yes.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. And you were appointed by the
3 Bankruptcy Court?

4 A. Judge Rhodes, yes.

5 Q. And were you called upon in that
6 case to set any budget for any litigation
7 arising in that case?

8 A. I was not.

9 Q. Were you called upon in that case
10 to review any budget for any litigation --

11 A. I was not.

12 Q. -- arising in that case?

13 How is it that that case prepared
14 you in any way to be an expert in this one?

15 A. Well, I reviewed tens of millions
16 of dollars of invoices for services rendered
17 in what I'll call, very broadly speaking,
18 comparable kinds of disputes. And so I had
19 the opportunity to see what kind of lawyers
20 provided what kind of service in conjunction
21 with what other lawyers at their firms
22 provided similar services and how many people
23 they used to do X, Y and Z and what the cost
24 of those things were. And I believe that we
25 reviewed approximately \$175 million in

1 ROBERT M. FISHMAN (1/10/19)

2 invoices. And so I believe that it gives me
3 some insight into the kind of costs that would
4 be associated with major projects conducted by
5 major firms in those kinds of cases.

6 Q. You mentioned "comparable kinds of
7 disputes." What were some of the comparable
8 disputes in the Detroit bankruptcy?

9 A. Well, there were many, many
10 disputes in the Detroit bankruptcy case.
11 There were fights about revenue streams of
12 bonds. There were fights about special
13 revenue streams versus general revenue
14 streams. There were fights about the Detroit
15 art museum collection. There were fights
16 about the water and sewer district bond.
17 There were fights about labor contracts.
18 There were renegotiations of labor contracts.
19 Those are the ones that come to my mind
20 quickly.

21 Q. Were any of them state court
22 actions?

23 A. No.

24 Q. Were any of them matters involving
25 the rights and obligations of indenture

1 ROBERT M. FISHMAN (1/10/19)

2 trustees?

3 A. You know, I'm not sure.

4 Remembering that I am reviewing invoices and
5 not so much reviewing pleadings, I did look at
6 some pleadings, I'm just not -- I'm not
7 certain on whether there were any implications
8 for the rights of indenture trustees in those
9 cases.

10 Q. What about your role in the
11 Petters' bankruptcy; how did that differ from
12 your role in Detroit?

13 A. Well, that was a private
14 engagement. That was not appointed by the
15 Court. The Petters' plan was confirmed
16 sometime I think in 2016, if I remember
17 correctly. A trustee, a post-confirmation
18 trustee and a post-confirmation advisory
19 committee were created under the plan. I was
20 retained by them privately to be the -- I
21 think we may have called it a fee
22 administrator just to differentiate between a
23 Court-position and a non-Court-appointed
24 position to handle the professional fees for
25 the myriad of post-confirmation legal services

1 ROBERT M. FISHMAN (1/10/19)

2 that the trustee and the advisory committee
3 were utilizing to finish their obligations
4 under the plan.

5 Q. How did that engagement differ in
6 terms of your specific role in terms of
7 reviewing legal bills from the Detroit case?

8 A. The context is a little different
9 because it wasn't a Court-appointed position.
10 So whatever authority, in quotes, you want to
11 say is attributable to a fee examiner because
12 of his appointment by the Court doesn't exist
13 in the Petters' case.

14 In the Detroit case, a very
15 intricate fee review order was drafted by me
16 and commented on by others and ultimately
17 entered by the Court, and so the fee review
18 process was a Court-imposed fee review
19 process.

20 In the Petters' case, I did the
21 same thing, which is to create a fee review
22 process. That fee review process was
23 something that people had to voluntarily agree
24 to be bound by. And of course the advisory
25 committee made it a condition of their

1 ROBERT M. FISHMAN (1/10/19)

2 employment that they agreed to it. So it
3 wasn't like it was really optional, but it
4 didn't have the force of a Court order.

5 Secondly, in the Petters'
6 situation, we used a slightly less formal
7 process, mostly because the formality required
8 by Title 9 of the Bankruptcy Code isn't
9 present in the Petters' case, and so many of
10 the bells and whistles that we needed in
11 Detroit were unnecessary in the Petters'
12 situation.

13 Q. In the Detroit case, did you have
14 say over whether a particular fee entry by
15 counsel in that case was reasonable or not
16 reasonable?

17 A. Yes.

18 Q. And did the judge have some role in
19 that as well?

20 A. Well, it's an interesting question.
21 Chapter 9 is a lot different than Chapter 11
22 in some very meaningful ways. And some of
23 those really meaningful ways are the fact that
24 parties are not retained pursuant to Court
25 order. Fees are not allowed pursuant to Court

1 ROBERT M. FISHMAN (1/10/19)
2 order. Fee applications are not filed. And
3 so I'd say it's a somewhat unsettled area of
4 the law as to exactly what role a bankruptcy
5 judge in a Chapter 9 case can have with
6 respect to the approval of the fees of
7 professionals paid for by the estate. And the
8 provision in Chapter 9 that gives the judge a
9 role in that issue is one that doesn't exist
10 in Chapter 11, and it's in the planned
11 confirmation part of the statute. And it says
12 that one of the things that the Court has to
13 find in order to confirm plan is that the fees
14 are reasonable and had been publicly
15 disclosed.

16 And so the judge wasn't involved in
17 the operation of the fee review process at
18 all. He just didn't have a role in it. He
19 did ultimately find at the confirmation
20 hearing that the fees that were incurred were
21 reasonable, and that they had been publicly
22 disclosed. I'm the one that did the public
23 disclosure of the fees by the filing of the
24 report that I did on a quarterly basis.

25 Q. Did there come occasions that you

1 ROBERT M. FISHMAN (1/10/19)

2 found that fees were unreasonable?

3 A. Well, I'd answer that question in
4 two ways. There were many, many, many
5 occasions where I raised questions about the
6 invoices of the various professionals. And
7 I -- the process was that I would send a
8 preliminary report to whichever professional
9 firm we're talking about and only to them in
10 which I would question whatever I found in
11 their invoice that I either needed clarifying
12 or that I felt might not be reasonable or that
13 I needed more explanation for in order to
14 understand why it was reasonable.

15 And so every single month we sent a
16 report to each of the professional firms, and
17 then we had a discussion period by virtue of
18 the Court order that followed that -- I want
19 to say it may have been 20 days, but I may not
20 be remembering correctly -- in which that
21 professional firm and I would discuss my
22 questions and their answers. And in most
23 instances we were able to reach an
24 understanding of an appropriate adjustment.
25 Occasionally I was persuaded an adjustment

1 ROBERT M. FISHMAN (1/10/19)
2 wasn't needed. More times than not I
3 persuaded them that some adjustment was
4 needed. And in only one circumstance did I
5 ever have to file a quarterly report which
6 said someone's fees were unreasonable for a
7 particular task. And the one time that I
8 needed to do that, I did that and they called
9 me up and said let's not do that again.

10 Q. When you would engage in that
11 process that you just described where you
12 would -- I'll be a bit colloquial here, but
13 where you would push back on the fees; you
14 understand what I mean by that?

15 A. Yeah.

16 Q. Where you would push back on the
17 fees contained in a legal invoice that you
18 were reviewing, what criteria did you use to
19 determine that the fees were excessive?

20 A. Well, we created a list which maybe
21 had, I'm estimating, 15 criteria that we used
22 to review the fees and we assigned each one a
23 letter. And when we went through the -- when
24 the invoices were submitted, they were
25 converted to Excel spreadsheets and we created

1 ROBERT M. FISHMAN (1/10/19)
2 a column for fee examiner comments, and one or
3 more of those letters would go into a box in
4 which we questioned the fees on that line, and
5 then there would be a comment section out to
6 the right of that where we would try to
7 articulate with a little more detail what it
8 was about the particular entry that gave us
9 pause. And then that Excel spreadsheet with
10 those letters and comments was what we would
11 send as the preliminary report.

12 So it could be all kinds of things.
13 It could be it's a duplicate entry. It could
14 be you sent too many people to a deposition.
15 It could be you used a senior person to do a
16 junior person's work. It could be lumping or
17 bundling, the kind of things that every
18 Chapter 11 lawyer likes to talk about. It
19 could be an unreimbursable expense or an
20 excessive expense. Like I said, there were at
21 least 15 things, and I really don't remember
22 the whole list off the top of my head, but I
23 would say that if you are looking at the list,
24 as an experienced Chapter 11 lawyer, you
25 wouldn't be surprised at the things that you

1 ROBERT M. FISHMAN (1/10/19)

2 would see on the list.

3 Q. So let me just pick out one of the
4 things you mentioned.

5 A. Okay.

6 Q. Staffing and senior lawyers doing
7 work that could be done by junior lawyers?

8 A. Sure.

9 Q. What is it about your experience
10 that allowed you to make that call, whether --
11 that there was some time entry and you
12 determined that that time entry should have
13 been -- or the work behind that time entry
14 should have been done by a junior lawyer as
15 opposed to the more senior lawyer?

16 A. All right. Let's use Jones Day as
17 an example. They were the debtor's lawyers
18 and they incurred more fees than anyone else.
19 If David Hyman was reviewing documents for
20 privilege, that would probably be something
21 that I would question, why David Hyman would
22 need to be reviewing documents for privilege.
23 And I would suggest that there's likely not a
24 justification for having your most expensive
25 lawyer and your most senior lawyer reviewing

1 ROBERT M. FISHMAN (1/10/19)
2 documents for privilege. I would certainly
3 give them chance to explain to me why he
4 needed to do it instead of a \$450 an hour most
5 junior associate.

6 So when it comes to going to
7 hearings, when it comes to creating reports,
8 when it comes to going to depositions or
9 attending mediations or whatever things you
10 can think of, I believe that I have a general
11 sense what staffing should look like for most
12 of these kinds of projects. That doesn't mean
13 that a particular project doesn't justify more
14 top-heavy staffing or it doesn't justify even
15 less top-heavy staffing. Sometimes from the
16 invoice itself you can't tell that, but that's
17 the point of raising the question and asking
18 for clarification. Because if there's an
19 explanation as to why five lawyers needed to
20 attend a particular deposition or a particular
21 mediation, I might not be able to get that
22 simply from the invoice, and so I give them a
23 chance to explain to me why this particular
24 circumstance would justify greater
25 participation.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. So there are some tasks -- and
3 correct me if I'm wrong, but there are some
4 tasks that are appropriate to be staffed with
5 a concentration of junior lawyers and there
6 are some tasks that law firms provide that are
7 appropriate to concentrate with senior
8 lawyers, right?

9 A. Well, I can't disagree with that
10 general statement, no.

11 Q. And so let's take a task like
12 document review.

13 A. Um-hum.

14 Q. That's a task that should be more
15 concentrated in terms of staffing at the
16 junior lawyer level, correct?

17 A. Well, talking about a hypothetical,
18 document review of a hypothetical case, but my
19 instinct is that generally speaking that would
20 be true. I certainly appreciate that there
21 might be circumstances in which that won't
22 necessarily be true, but that's -- that's the
23 point of the preliminary review. And the
24 discussion is to give people a chance to
25 explain why what appears to be top-heavy

1 ROBERT M. FISHMAN (1/10/19)

2 staffing isn't. And sometimes the
3 explanations make sense to me and sometimes
4 they don't.

5 Q. And there are other tasks like
6 appearing at a court hearing for argument
7 where you would expect to see a concentration
8 of more senior lawyers; is that fair?

9 A. Yes, typically I would say that
10 would be the norm.

11 Q. And so applying the same
12 concentration of junior lawyers to senior
13 lawyers across all tasks wouldn't fit within
14 the framework that we just outlined, right?

15 A. Well, theoretically it might not be
16 appropriate.

17 Q. Okay. How -- tell me how you came
18 to be engaged for this project?

19 A. This one here?

20 Q. Yes.

21 A. A Reed Smith lawyer called me and
22 explained the project to me and asked me if I
23 thought I was capable of expressing opinions
24 on the topic. And after a couple of
25 back-and-forths, he and I decided that I could

1 ROBERT M. FISHMAN (1/10/19)

2 be an appropriate person to do that.

3 Q. When was that contact made?

4 A. The very first call came on
5 Thanksgiving weekend, but then I didn't hear
6 from anybody for a while or there was just
7 sort of modest general follow-up and the
8 real -- the real meat-and-potatoes discussions
9 didn't occur until the middle of December.

10 And I don't remember the exact dates.

11 Q. Who was the Reed Smith lawyer who
12 contacted you?

13 A. The first person that contacted me
14 was Eric Schaffer, who I've known for some
15 time.

16 Q. That gets to where I was going.

17 How do you know Mr. Schaffer?

18 A. From bankruptcy organizations over
19 the years. I've never been in a case with
20 him, but National Conference of Bankruptcy
21 Judges, American Bankruptcy Institute,
22 American College of Bankruptcy, I've seen him
23 in those settings numerous times.

24 Q. Have you socialized together?

25 A. I have gone out to dinner with him

1 ROBERT M. FISHMAN (1/10/19)

2 at such conferences a few times. I have never
3 socialized with him in other respects.

4 Q. Has he hired you as an expert
5 before?

6 A. No.

7 Q. Has Reed Smith hired you as an
8 expert before?

9 A. No.

10 Q. Has Reed Smith hired you for any
11 purpose before?

12 A. I had a case referred to me by
13 Reed Smith five, six, seven years ago.

14 Q. Was that by Mr. Schaffer?

15 A. No, it was by Stephen Bobo in the
16 Chicago office who I've known for 30 years.

17 Q. Okay. What about The Bank of
18 New York, have you ever had an engagement for
19 The Bank of New York before?

20 A. I don't believe so.

21 Q. Have you ever appeared as counsel
22 for The Bank of New York?

23 A. I don't believe so. I can't speak
24 to whether anyone at my firm has, especially
25 since I'm at a new firm. Frankly I don't even

1 ROBERT M. FISHMAN (1/10/19)

2 know the answer to that question other than it
3 was cleared for conflicts. But I personally
4 do not believe that I have represented The
5 Bank of New York.

6 Q. And you've never done any work for
7 Ambac Assurance Corporation, right?

8 A. I do not believe I have ever done
9 any work for him.

10 Q. How about Whitebox Advisors?

11 A. Until this case was presented to
12 me, I'm not sure I've even heard of them.

13 Q. Okay. Are you familiar with a
14 gentleman named Daniel Goldberg?

15 A. I know him by name.

16 Q. Have you met him in person?

17 A. I met him in person once in line to
18 get sandwiches for lunch.

19 Q. When was that?

20 A. Yesterday.

21 Q. Are you familiar with a report that
22 Mr. Goldberg has written in connection with
23 this matter?

24 A. I am familiar with it.

25 Q. That report is in front of you. It

1 ROBERT M. FISHMAN (1/10/19)

2 was marked earlier today.

3 A. Right here?

4 Q. You can refer to it if you need to,
5 I just want you to know it's there.

6 A. Okay.

7 Q. The other document that's there --
8 and his report is Goldberg 1. The other
9 document that's there is Goldberg 2.

10 A. Okay.

11 Q. When was the -- I may have asked
12 you this, I'm sorry. Have you ever spoken to
13 Mr. Goldberg on the phone?

14 A. I have never spoke to him on the
15 phone.

16 Q. Have you ever spoken to any of his
17 colleagues at his law firm on the phone?

18 A. Not knowingly.

19 Q. Have you ever met with any of his
20 colleagues from his law firm?

21 A. I have not.

22 Q. The report that is in front of you
23 at Goldberg 1, when was the first time that
24 you -- well, strike that.

25 The report that's in front of you

1 ROBERT M. FISHMAN (1/10/19)

2 as Goldberg 1, you've seen it before?

3 A. Yes.

4 Q. When was the first time you saw it?

5 A. Well, certainly it was in the
6 latter part of December. I'm not sure that I
7 could tell you precisely what day. I just
8 can't. I guess I could look at e-mails and
9 figure it out if I needed to, but I don't know
10 the answer. But it was in late December.

11 Q. Do you understand the first time
12 you saw it that you were looking at a draft of
13 it?

14 A. I believe I was looking at a draft,
15 yes.

16 Q. Did you subsequently see later
17 drafts over time?

18 A. Maybe. Maybe one other one. I
19 don't remember precisely. Maybe one.

20 Q. You mentioned that you saw
21 Mr. Goldberg yesterday in line for sandwiches?

22 A. Yes.

23 Q. Was that at or near the law firm of
24 Reed Smith?

25 A. It was at the law firm of

1 ROBERT M. FISHMAN (1/10/19)

2 Reed Smith.

3 Q. Were you there to prepare for
4 today?

5 A. I was.

6 Q. Was it your understanding
7 Mr. Goldberg was there to prepare for today?

8 A. It's my assumption he was.

9 Q. Did you prepare together?

10 A. We did not.

11 Q. When was the last time you read
12 Mr. Goldberg's report?

13 A. I looked at part of it earlier
14 today.

15 Q. How would you characterize the
16 opinion that you've offered in this case?

17 A. I'm not sure what you mean by that.

18 Q. What is your expert opinion in this
19 case?

20 A. Well, at a minimum, my expert
21 opinion is that the amount of money that
22 Mr. Goldberg has identified as an appropriate
23 holdback for the anticipated litigation, the
24 defining term that I think both he and I use,
25 is a reasonable holdback.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. And what is that amount that
3 Mr. Goldberg estimates to be a reasonable
4 holdback?

5 A. If I remember correctly, it's a
6 range between 25 million and 40 million with a
7 midpoint of 32 if my math is -- I know the
8 round numbers. I don't remember the exact
9 numbers.

10 Q. And describe for me as you
11 understand it the anticipated litigation.

12 A. Well, I mean, I think in my report,
13 I set out what I think the topics are, I'm not
14 sure that I can recite them perfectly off the
15 top of my head, but it involves claims by
16 two -- I'll use the word "bondholders"
17 loosely, two bondholders alleging gross
18 negligence and/or willful misconduct and/or
19 fraud on the part of the Bank of New York as
20 trustee of the bonds.

21 Q. What is the nature of the failing,
22 if you will, by the bank as alleged by the two
23 bondholders?

24 A. Well, since the case isn't filed,
25 I'm not sure I can answer that question.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. When you say "the case isn't
3 filed," what do you mean by that?

4 A. Well, my understanding is that the
5 pending lawsuits, which I have at least looked
6 at, are not necessarily the cases that we're
7 talking about as the, quote/unquote,
8 anticipated litigation, and that therefore I
9 don't know what the allegations of the
10 anticipated litigation are going to be, what
11 the relief that's requested is going to be,
12 what the damages that are going to be
13 requested will be.

14 Q. Have you read the Complaints that
15 were filed by Ambac and Whitebox, which are
16 the two bondholders that you're referring to?

17 A. I certainly looked at them both.
18 They are fairly lengthy and I would not want
19 to say that I read them word for word, cover
20 for cover, but I did try to get a flavor for
21 what they were about.

22 Q. When did you first read the
23 Complaints?

24 A. Sometime in the latter half of
25 December.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. Did you read the Complaints before
3 you prepared a report?

4 A. Certainly.

5 Q. And you reviewed Mr. Goldberg's
6 declaration before you prepared your report,
7 correct?

8 A. I'm not sure that's 100 percent
9 accurate. I think I probably was working on
10 the report already in anticipation of what I
11 thought Goldberg's report might say. I didn't
12 write the parts that relied on his report
13 before I saw his report, but there were plenty
14 of parts of this that I could write without
15 his report, and so I'm certain I had started
16 those parts beforehand. Wasn't much time
17 here.

18 Q. Are you referring to the background
19 sections?

20 A. And -- well, yeah, I guess I'm
21 probably referring to certainly Roman numerals
22 I, II and III of the table of contents in my
23 report.

24 Q. When did you first hear or learn of
25 the estimated range that Mr. Goldberg was

1 ROBERT M. FISHMAN (1/10/19)

2 going to offer of 25- to \$40 million?

3 A. Sometime in late December. Like I
4 said, I can't recall what day that was.

5 Q. And how long after you learned of
6 that range did you determine that that range
7 was reasonable?

8 A. Ten days, a week, give or take. I
9 don't know. It could have been a little more,
10 it could've been a little less. Those days
11 all sort of seem the same to me right now.

12 Q. And what did you do in that week or
13 ten days to get yourself comfortable that the
14 range that Mr. Goldberg offered was
15 reasonable? And please be as specific as you
16 can.

17 A. Well, the main thing I did was read
18 his report and his exhibits very carefully
19 because I was asked to assume that what he
20 provided was -- were the facts. That was an
21 assumption that I was asked to make. And so I
22 read them in order to understand the
23 assumption because I couldn't express an
24 opinion about the assumption if I didn't
25 understand it.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. Do you now feel that you understand
3 Mr. Goldberg's assumptions?

4 A. I think I understand them fairly
5 well, yes.

6 Q. Okay. Mr. Goldberg makes an
7 assumption that the blended billing rate for
8 the attorneys that are going to represent The
9 Bank of New York and the anticipated
10 litigations is -- well, let me ask you, do you
11 recall what the blended rate is?

12 A. Well, there were two blended rates
13 in his report. One was the simple, add up the
14 lawyers, add up the rates, divide by the
15 number of lawyers. And the second one was the
16 weighted blended rate where he lowered the
17 rate to account for more work by junior people
18 and less work by senior people. If I remember
19 correctly, the average number was 895, and the
20 weighted number was 800. That's what I
21 remember.

22 Q. And how did he arrive at the
23 weighted figure?

24 A. I don't know what adjustment he
25 made specifically in calculating the amount of

1 ROBERT M. FISHMAN (1/10/19)

2 time the junior people would spend versus the
3 senior people, other than the extent to which
4 if I engaged in a detailed mathematical
5 analysis of his exhibits, I might be able to
6 figure that out, but I was told to take those
7 things as assumptions, and so I didn't try to
8 deconstruct his number.

9 Q. Well, you would agree with me that
10 built into the weighting are some assumptions
11 about how many hours are going to be devoted
12 to a particular task by junior people versus
13 senior people, correct?

14 A. Yes, I think that's in his
15 exhibits.

16 Q. And did you make any finding as to
17 the reasonableness of that weighting?

18 A. I did because I looked at those
19 exhibits, I read them very carefully line by
20 line. And I -- again, trying to apply them to
21 what I consider to be a hypothetical lawsuit
22 is a little bit complicated, but I thought
23 based on the assumptions that I was asked to
24 make about what that anticipated litigation
25 would look like and would involve, I found

1 ROBERT M. FISHMAN (1/10/19)

2 that the range of numbers that he put forth
3 was reasonable.

4 Q. But, again, you don't know --
5 correct me if I'm wrong. You don't know how
6 the blended rate was arrived at mathematically
7 in terms of weighting between junior lawyers
8 and senior lawyers?

9 A. I did not do the math to figure out
10 what adjustment he made specifically. I know
11 it's a \$95 an hour adjustment and I'm not sure
12 what weights he moved where in order to come
13 up with that.

14 Q. Do you know whether he changed that
15 weighting for a particular task so that a
16 document review task, for example, would have
17 a different weighting than an argument in
18 court might have?

19 A. I believe on some of the tasks in
20 his exhibit he specifically referenced --
21 let's just call them less expensive lawyers to
22 do certain document and privilege review
23 stuff, I think they were \$350 an hour people,
24 which would, by definition, sort of bring that
25 weighted average down for those particular

1 ROBERT M. FISHMAN (1/10/19)

2 projects.

3 Q. But other than that one example of
4 document review where there's a separate cost
5 associated with the document review team, is
6 there any other task where the weighting on
7 the blended rate has changed from one task to
8 another task?

9 A. I think the answer is no.

10 Q. Let's take a look at the
11 spreadsheet that has been marked as Goldberg 2
12 in front of you. And I'll represent to you
13 that's Exhibit D to the Goldberg declaration.

14 A. There's two sides. I was going to
15 say it's a two-page thing I thought.

16 Q. Let's take the first item on the
17 spreadsheet.

18 A. Okay.

19 Q. So the first column has a dollar
20 figure for the lower end of Mr. Goldberg's
21 reasonable estimate, correct?

22 A. Yes.

23 Q. And the second column is the number
24 of hours estimated for that task, correct?

25 A. Yes.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. And if you look at the next column
3 over, which is "Explanation," Mr. Goldberg has
4 inserted some explanation for how he's arrived
5 at these numbers; is that right?

6 A. It's how he arrived at the number
7 of hours, yes.

8 Q. And if you look at -- for the first
9 row, which is "Fact Investigation,"
10 Mr. Goldberg explains that there are going to
11 be three associates and two partners working
12 on fact examination, right?

13 A. That is what it says.

14 Q. And he estimates that those
15 lawyers, those five lawyers total, are going
16 to be work 150 hours per month, correct?

17 A. That's what it says.

18 Q. For one month?

19 A. Um-hum.

20 Q. And he arrives at a lower estimate
21 of lawyers at 750 by multiplying the five
22 lawyers times 150 hours per month, right?

23 A. That is what I understood it to
24 mean.

25 Q. And then he multiplies the

1 ROBERT M. FISHMAN (1/10/19)

2 750 hours times the blended rate of 800 to
3 arrive at the \$600,000 lower reasonable
4 estimate; is that right?

5 A. I think that's correct.

6 Q. That same formula in terms of
7 multiplying the number of lawyers times the
8 number of hours is carried forward on the next
9 line, which is "Analysis and strategy" on
10 "motion to dismiss," which is the fourth or
11 fifth row down; do you see all that?

12 A. Um-hum.

13 Q. So you'd agree with me that on
14 those tasks, the blended rate of \$800 an hour
15 is being used regardless of whether the tasks
16 are being accomplished by partners and
17 associates?

18 A. Well, I can't say that I went
19 through and did the math on each line item to
20 have a factual opinion that what you just said
21 is correct, but it seems to be that's what
22 he's doing, yes.

23 Q. Without having done the math, as
24 I've just done it, how did you determine that
25 these entries were reasonable?

1 ROBERT M. FISHMAN (1/10/19)

2 A. It was my understanding that he was
3 creating the number of hours by saying how
4 he's going to staff it and multiplying it by
5 the blended rate, which was apparently the way
6 he chose to take into account the
7 junior/senior ratio, and I went through and
8 looked at these numbers. And I can't say that
9 in each instance I took out my calculator and
10 determined that he did the math correctly, but
11 that was my understanding of how he was doing
12 it. So if there's a math error in here,
13 then -- if it was brought to my attention, I
14 could comment on it.

15 Q. The blended rate of 800, that could
16 be -- if I represented to you that that was a
17 one-to-one ratio of associates to partners,
18 would that be reasonable to you?

19 A. I would have to be persuaded that
20 in those instances the work was appropriately
21 divided on a -- basically on a 50/50 basis for
22 me to conclude that it was reasonable.

23 Q. And if it was 67/33, same answer,
24 you'd have to look at it?

25 A. Well, in order to express an

1 ROBERT M. FISHMAN (1/10/19)
2 opinion about any particular ratio, I'd have
3 to look at it, but my level of skepticism
4 might rise as the ratio was tilted more in
5 favor of senior and less in favor of junior,
6 but then certain projects might justify that
7 and certain other ones might not. And so the
8 particular project would bear on how I would
9 feel about it as well.

10 Q. And you haven't done that work on a
11 project-by-project basis in this case?

12 A. I have not because I was asked to
13 assume that these were the facts.

14 Q. Okay. Do you have any knowledge
15 one way or the other as to whether The Bank of
16 New York has already engaged in some fact
17 investigation in connection with the
18 anticipated litigations?

19 A. I have -- I can only presume that
20 they have done some because the case has been
21 ongoing, but I can't help you with explaining
22 the level of it, I don't know.

23 Q. Well, how do you determine how much
24 time for fact investigation is reasonable when
25 you don't know how much institutional

1 ROBERT M. FISHMAN (1/10/19)

2 knowledge the lawyers representing The Bank of
3 New York already have on this case?

4 A. I'll give you two answers. One,
5 Mr. Goldberg tells me that he took it into
6 account. Number two, without having an actual
7 complaint to look at, I wouldn't -- I'm not
8 entirely sure what to say about it because
9 it's hypothetical. So the reasonableness test
10 is not here about the actuality of this. It's
11 about whether it's hypothetically reasonable
12 because that's all we have.

13 So, for instance, the extent to
14 which a new complaint, if there is a new
15 complaint, because I don't even know if there
16 will be one, the extent to which a new
17 complaint raises lots of issues that are not
18 raised in the original complaint, that would
19 certainly impact my thinking. I don't have a
20 new complaint to look at.

21 Q. You said in your last answer that
22 Mr. Goldberg tells me that he took it into
23 account?

24 A. I believe it's in his report in a
25 couple of places.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. What did he take into account?

3 A. The benefit of the learning curve
4 that people who had already been working on
5 the case would have.

6 Q. You relied on Mr. Goldberg to make
7 that assessment; is that correct?

8 A. I did.

9 Q. You did not take it upon yourself
10 to make any assessment as to how much work had
11 already been done by the lawyers representing
12 Bank of New York over the last two and a half
13 years?

14 A. I was not asked to do that and I
15 did not do that.

16 Q. Mr. Goldberg says in his report in
17 paragraph 39 if you want to take a look at it.

18 A. Okay.

19 Q. In the second sentence he says "The
20 anticipated litigation is reasonably viewed as
21 a serious threat to the core of the corporate
22 trust business. The issues" --

23 A. Yes.

24 Q. "The issues raised in the
25 anticipated litigation appear to be wide

1 ROBERT M. FISHMAN (1/10/19)

2 ranging and consequential." Do you see that?

3 A. I do.

4 Q. Is that consistent with your
5 understanding of the seriousness of how Bank
6 of New York views this case or views the
7 anticipated litigations?

8 A. Yes.

9 Q. And it's your understanding that
10 the complaints filed by Ambac and Whitebox
11 against The Bank of New York have been pending
12 since sometime in 2017, correct?

13 A. I believe that's right.

14 Q. Would you also agree with me that
15 where a litigation -- where litigation is
16 filed against The Bank of New York and that
17 litigation is as serious as Mr. Goldberg says
18 it is and as you have agreed, that there would
19 be a significant amount of work from the day
20 the action is filed to start looking at it
21 very carefully, evaluating defenses, doing
22 case assessment, doing it legal research,
23 et cetera?

24 A. These sentences are about the
25 anticipated litigation, which he doesn't know

1 ROBERT M. FISHMAN (1/10/19)
2 exactly what that's going to be, and I don't
3 know exactly what that's going to be. How
4 much work they did on the existing litigation
5 and of how much benefit it will be with
6 respect to the anticipated litigation can't
7 really be answered factually. I don't know
8 whether it's going to be largely the same
9 allegations or substantively different
10 allegations. And therefore all I was agreeing
11 with was his analysis of the anticipated
12 litigation. He didn't opine on, as near as I
13 could tell, and I wasn't asked to opine on
14 what was done by The Bank of New York in the
15 existing litigation.

16 Q. What is your understanding of how
17 the existing litigation differs from the
18 anticipated litigation?

19 A. Well, I'm not sure how to describe
20 how it will differ from anticipated litigation
21 because I can't see what the anticipated
22 litigation's actually going to be. But my
23 understanding is there are -- there's a line
24 drawn by the confirmation of the plan, which
25 will release and eliminate certain kinds of

1 ROBERT M. FISHMAN (1/10/19)
2 claims and leave open for future disposition
3 certain other kinds of claims. And the
4 anticipated litigation, as I understand it,
5 will be about those claims on the remaining
6 side of the line and won't have anything to do
7 with -- although I say that very loosely
8 because there may be similar facts, I don't
9 know, there may be similar conduct for those
10 claims that are being released by virtue of
11 confirmation on the plan.

12 Q. What kinds of claims were left open
13 for future disposition; that's a quote from
14 your answer?

15 A. I think they're described as gross
16 negligence, willful misconduct and fraud, if I
17 remember correctly.

18 Q. And what kind of claims are barred
19 by the plan?

20 A. I'm not sure I remember the list as
21 well as I do the ones that are going to be
22 part of the anticipated litigation, but it's
23 breach of contract, breach of fiduciary duty,
24 negligence. That's what I remember
25 specifically.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. Let's take a look at paragraph 28
3 of your declaration.

4 A. Okay.

5 Q. About six, seven lines down,
6 there's a sentence that begins "Ambac alleges
7 that BNYM is liable for failing to recognize
8 events of default and failing to accelerate
9 the senior bonds. Ambac asserts six causes of
10 action for breach of fiduciary duty, breach of
11 contract, breach of the implied covenant,
12 gross negligence/breach of trust, declaratory
13 judgment and injunctive relief. Ambac alleges
14 that BNYM's conduct has caused Ambac to suffer
15 millions of dollars in damages." Did I read
16 that correctly?

17 A. You did.

18 Q. And one of those causes of action
19 that I just read, as you describe them in your
20 report, is for gross negligence, correct?

21 A. Correct.

22 Q. And gross negligence, as you
23 acknowledge, is a claim that survives the
24 plan, correct?

25 A. Yes.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. You understand that the anticipated
3 litigation includes Ambac's claim for gross
4 negligence, right?

5 A. I understand that the
6 anticipated -- the anticipated litigation
7 might include claims for gross negligence,
8 yes.

9 Q. So the gross negligence allegation
10 that was filed in 2017 by Ambac and that
11 Mr. Goldberg says is a threat to the core of
12 the indenture business, correct?

13 MR. SOLOMON: Object to the form
14 of the question.

15 A. I think his reference to a threat
16 to the core of the business is a broader
17 reference that incorporates more than just
18 gross negligence.

19 Q. But it includes the gross
20 negligence claim, correct?

21 A. I believe it includes it, yes.

22 Q. And so back to where we started a
23 few minutes ago, would you agree with me that
24 as soon as the Complaint was filed alleging
25 gross negligence, that Bank of New York would

1 ROBERT M. FISHMAN (1/10/19)

2 start doing fact assessment and legal research
3 and developing its defense right away?

4 A. I would agree that it is likely
5 that they would do some of that, yes.

6 Q. And when you reviewed the estimated
7 fees laid out by Mr. Goldberg, did you
8 incorporate into what was reasonable or not
9 reasonable any accounting for the prior work
10 that was done?

11 A. I don't know what the prior work
12 that was done is.

13 Q. Did you ask anyone?

14 A. I did not.

15 Q. Do you have an understanding one
16 way or the other of what Reed Smith's fee
17 arrangement is with The Bank of New York?

18 A. I really don't know what it is.

19 Q. And you haven't asked anyone?

20 A. I have not asked anyone.

21 Q. Do you know whether Reed Smith
22 presented Bank of New York with a budget for
23 the defense of the anticipated litigation?

24 A. I do not know that.

25 Q. Have you asked for it?

1 ROBERT M. FISHMAN (1/10/19)

2 A. No.

3 Q. If Reed Smith had actually prepared
4 and presented to The Bank of New York a budget
5 for the anticipated litigation, would you
6 consider that to be a more realistic predictor
7 of the actual legal fees to be incurred than
8 the hypothetical estimate in the Goldberg
9 declaration?

10 A. I guess in order to answer that I'd
11 have to see the budget that they prepared in
12 order to determine if it was more or less
13 reasonable.

14 Q. Are you aware of any distinction
15 made by Mr. Goldberg between the Ambac side of
16 the anticipated litigation versus the Whitebox
17 side?

18 A. I am not recalling any significant
19 difference.

20 Q. So is it your understanding that
21 if -- let's just say hypothetically that
22 Whitebox would settle out tomorrow and only
23 the Ambac litigation was going forward -- you
24 following me through that hypothetical? How
25 would Mr. Goldberg's estimates change?

1 ROBERT M. FISHMAN (1/10/19)

2 A. Well, I'm not sure I can tell you
3 how Mr. Goldberg would change his estimates.
4 He'd have to tell you that.

5 Q. Would the assessment of the
6 reasonableness of his assessments change if
7 that were the case?

8 A. Well, I would assume that he would
9 provide me with new material based on the
10 changed circumstances, which either would
11 change his adjustment -- change his assessment
12 or wouldn't, and that at the time I would read
13 what he proposed and I would be able to react
14 to whether it changed my view of the
15 reasonableness of his assessment.

16 Q. If there were one plaintiff versus
17 two, would you expect that to change the
18 estimates in the Goldberg report?

19 A. You know, I'm not sure because
20 claims that are extremely similar are made by
21 one party versus that are made by two parties,
22 I'm not sure how much that changes the fire
23 drill. It might change it somewhat because if
24 party A is not asserting claims, then
25 certainly there's some -- some discovery that

1 ROBERT M. FISHMAN (1/10/19)

2 wouldn't need to be done because party A isn't
3 involved anymore. But the underlying proof of
4 the issues might still implicate party A and
5 its behavior and its allegations at the time,
6 and so it's also possible that it would
7 largely be unchanged.

8 But then I don't have the benefit
9 of saying party A's anticipated litigation or
10 party B's anticipated litigation, and so I
11 don't know how similar they are or how unique
12 they are.

13 Q. Mr. Goldberg estimates a range of
14 25- to \$40 million for the anticipated
15 litigations, correct?

16 A. That's what I recall.

17 Q. If his estimate had been 25- to
18 50 million instead of 25 to 40, such that the
19 upper range of his estimate had been increased
20 by that proportionate amount, would you have
21 found that to be reasonable?

22 A. Well, I don't think I can really
23 answer your question.

24 Q. Why not?

25 A. I'll tell you. He provides on

1 ROBERT M. FISHMAN (1/10/19)
2 his -- I guess it's Goldberg Exhibit 2 an
3 explanation of what adjustment he made to go
4 from the lower estimate to the higher
5 estimate. If he raised his estimate by
6 \$10 million, I presume he would provide me
7 with an explanation of why he chose that
8 larger number. And then when I read that
9 explanation I would be in a position to say
10 that makes sense to me or that doesn't make
11 sense to me.

12 Q. Okay. Let's take it on a line item
13 basis. Let's look, again, at fact
14 investigation, which is the first line.
15 Explain to me, as you understand it, the
16 difference between the low end and the high
17 end of that estimate.

18 A. Just appears to be a longer period
19 of time.

20 Q. What is the difference between the
21 two periods of time?

22 A. One month to two months, I believe.

23 Q. So if the high end hadn't been two
24 months, but two and a half months, would you
25 have found that to be reasonable?

1 ROBERT M. FISHMAN (1/10/19)

2 A. I'm not sure. I certainly would
3 accept the notion that as the number gets
4 bigger, the likelihood that I question it gets
5 higher, but that's without the benefit of any
6 explanation. And an important -- to me, an
7 important part of the reasonableness of a
8 budget is the extent to which it controls the
9 ultimate amount of fees that are paid. And so
10 if we were talking about a budget which once
11 established meant you'd get paid that amount,
12 then the budget is a more important factor in
13 the consideration.

14 But if the fees that are ultimately
15 going to be earned are themselves going to be
16 subject to not a pre-performance hypothetical
17 analysis, but a post-performance actual
18 analysis and you sort of have a fail safe in
19 the sense that if you took two and a half or
20 three months to do that investigation and you
21 couldn't explain why you needed to do that,
22 then that might cause me to find those actual
23 services to be unreasonable. It's a lot
24 harder to talk about what's an unreasonable
25 amount of time to investigate a hypothetical

1 ROBERT M. FISHMAN (1/10/19)

2 complaint because I don't know what it says.

3 And that makes it a much more challenging

4 prospect.

5 Q. Well, you do know to some extent
6 what it says, right, because the Complaint
7 that you reviewed alleges gross negligence and
8 the complaint that will be filed in the
9 anticipated litigation will also allege gross
10 negligence, right?

11 A. Well, if you're telling me that the
12 new complaint is going to say the same thing
13 that the old one did and nothing more, that
14 would help me with that issue. If you're
15 telling me that the new complaint will include
16 something that was in the old complaint, but
17 might or will have all kinds of other things
18 in it, that becomes, to me, a much less
19 important question you've asked.

20 Q. So if you don't know what the new
21 complaint is going to say, how do you
22 determine if anything is going to be
23 reasonable or unreasonable?

24 A. Well, it's difficult, but what I
25 was asked to do was not figure that out for

1 ROBERT M. FISHMAN (1/10/19)
2 myself, but take what Mr. Goldberg told me was
3 going to be the likely contents of that
4 complaint and the likely staffing in order to
5 address that complaint and determine if his
6 assessment was reasonable.

7 So I'm not actually making an
8 assessment of the anticipated complaint
9 because I don't know what it's going to say.
10 I'm making an assessment of his assessment of
11 that complaint. And I thought -- I thought
12 that he gave a thorough analysis of why he
13 reached the conclusions that he did. People
14 could disagree with it. I didn't particularly
15 disagree with it.

16 Q. Your assessment of reasonableness
17 is based on the description given to you by
18 Mr. Goldberg of the anticipated litigation?

19 A. Yes, that's what I was asked to do.

20 Q. What was that description?

21 A. Well, I think I lay it out. It --
22 the anticipated litigation description that he
23 gave me was about what services would be
24 likely used to respond to the Complaint and
25 the various component parts of it and who

1 ROBERT M. FISHMAN (1/10/19)

2 would perform the services and how much they
3 would charge.

4 And he didn't so much tell me what
5 the anticipated litigation complaint was going
6 to say because I don't -- I doubt if he knows.
7 I certainly don't know what the allegations of
8 that anticipated complaint are going to be, so
9 we're all hamstrung by dealing with a
10 hypothetical set of claims. No one -- you
11 guys maybe, but nobody reading pieces of paper
12 that are available to the public knows what
13 this subsequent complaint is going to say. We
14 might be able to guess, but we don't know.

15 Q. Again, I don't mean to argue with
16 you, but I'm struggling with what anchors you
17 to any assessment to reasonableness when
18 there's an entire universe of possibility in
19 terms of what could be in the anticipated
20 litigation? What anchors you to some
21 assessment of reasonableness?

22 A. Well, I'm not sure there's an
23 entire universe. We know the three things
24 that survived the confirmation on the plan.
25 Mr. Goldberg has made an assessment based on

1 ROBERT M. FISHMAN (1/10/19)
2 his extensive experience in handling what I'll
3 call comparable cases about what he thinks it
4 likely could cost to deal with these kinds of
5 issues. And I was asked to rely on that. And
6 so rather than substitute my judgment for his
7 about an area that he has more expertise than
8 I do, I relied on his assessment and looked at
9 it and said this appears to be reasonable
10 based on what we know.

11 Q. Okay. So within the parameters of
12 Mr. Goldberg's assumptions, which have been
13 adopted by you, and we look at the -- the
14 amount of time Mr. Goldberg estimates for a
15 fact investigation, which is the first row on
16 Goldberg Exhibit 2, and Goldberg says the low
17 end of the range is 750 hours, which is what
18 he says is one month of work. The high end of
19 the range is 1500 hours, which he says is two
20 months of work. It's double. It could be one
21 month, it could be two, right?

22 A. Yeah.

23 Q. Okay. And I'm saying if Goldberg
24 had written that it might be one month, might
25 be two and a half months, would you deem that

1 ROBERT M. FISHMAN (1/10/19)

2 reasonable?

3 A. All I can say is I might because
4 I'd have to -- I'd have to look at the rest of
5 the budget. If that's the only thing that
6 changed, it might not affect my opinion very
7 much. If every single thing moved like that,
8 it might start to cause me to -- to question
9 it. So you've pick one line item and you've
10 moved it up a few dollars in a 25- to
11 \$40 million thing, so maybe you've caused it
12 to now be 25.5 to 40.5, I don't know how
13 excited I'd get about that.

14 When you asked me about going from
15 40 to 50, I said I'd have to read his
16 justification for that additional time before
17 I could decide if I thought it was reasonable
18 or not.

19 Q. Let's go down a line. This is for
20 "Analysis and strategy." You see that?

21 A. I do.

22 Q. The low end of the range is 360
23 hours, which he estimates is six lawyers
24 working two weeks?

25 A. I don't think that's what that

1 ROBERT M. FISHMAN (1/10/19)

2 says.

3 Q. You're right. Three partners
4 working one week and three associates working
5 two weeks?

6 A. I believe that's what it says.

7 Q. Okay. And the high range is three
8 partners working two weeks and three
9 associates working three weeks, right?

10 A. Right.

11 Q. And if the three associates had
12 instead of in the high range been estimated to
13 work three weeks, but four, how would you make
14 a determination as to whether that's
15 reasonable? What methodology would you use to
16 determine whether that's reasonable?

17 A. You know, there's no science to the
18 way you do this. I would not -- I would not
19 propose to you that there is science where you
20 can look at something and you can say this is
21 reasonable and this is unreasonable by
22 definition. It is how does it appear in the
23 overall context of the discussion. And there
24 is no point where it is by definition no
25 longer reasonable. And it's just a matter of

1 ROBERT M. FISHMAN (1/10/19)

2 using your experience to try to recognize
3 something that doesn't make sense to you.

4 Q. Okay. What you just said, that's
5 true on the low end of the range as well,
6 right?

7 A. I suspect it is because it's still
8 just an assessment of hypothetical litigation.

9 Q. Let's look at paragraph 5 of your
10 declaration.

11 A. Yep.

12 Q. You say here that "One of the
13 principal unresolved issues and the issue that
14 this report will address is the amount of
15 funds that the trustee is entitled to
16 reserve" -- and you define that as, quote,
17 "reserve funds," end quote -- "from funds
18 otherwise distributable to beneficial holders
19 of the bonds." Did I read that correctly?

20 A. I believe you did.

21 Q. Is it your understanding that a
22 holdback from distribution is the only method
23 of providing security to The Bank of New York
24 in this case?

25 A. It is my understanding that 19.5

1 ROBERT M. FISHMAN (1/10/19)

2 provides for the possibility of at least two
3 approaches.

4 Q. Okay. What's the second one?

5 A. I don't have it in front of me to
6 be precise, but I think it's the posting of a
7 bond or other collateral.

8 Q. And if a bond is posted for the
9 benefit of Bank of New York, would you still
10 hold to your assessment that -- withdrawn.

11 Strike that.

12 Your report does not contemplate
13 the posting of a bond, correct?

14 A. I don't specifically mention that,
15 no.

16 Q. Is there any particular reason why
17 you ignored that facet of Section 19.5?

18 MR. WELCH: Object to the form.

19 A. I guess I viewed the topic as being
20 more about the amount and less about the
21 vehicle. And because no particular bond
22 proposal was put forth for me to look at, I
23 didn't really have anything to say about that
24 whereas the reserve fund, I could understand
25 what was being contemplated. You take money

1 ROBERT M. FISHMAN (1/10/19)

2 and you put in a basket and you hold it, and
3 so I understand that. I think the math
4 applies similarly, probably identically, in
5 both contexts, the value piece.

6 Q. In paragraph 38 of your
7 declaration, you say "The reserve fund needs
8 to have an amount in it that will cover all of
9 the potential costs to BNYM from the
10 anticipated litigation."

11 A. I'm trying to find that.

12 Q. That's about ten lines down.

13 A. Got it. I don't know why I was
14 being so obtuse, but I found it.

15 Q. Okay. If the Plaintiffs or one of
16 them in the anticipated litigation were to
17 bond as opposed to have the security provided
18 to Bank of New York through a holdback, but
19 were to bond successive stages of litigation,
20 all right, you would agree with me that the
21 bond required at the beginning of the case
22 would not need to cover all of the potential
23 costs of the Bank of New York over the course
24 of the litigation?

25 A. I'm not sure just exactly what I

1 ROBERT M. FISHMAN (1/10/19)
2 would agree with. There were a lot of parts
3 to that question. If you want me to express
4 an opinion about how a bond might fit into
5 this story, I would need to know everything
6 about that bond. I would need to know who's
7 posting it, what's it posted for, what does it
8 take to get it, what conditions are there, how
9 long does it last. I mean, there's a lot of
10 questions that I would have before I would be
11 able to say this bond is just like cash.

12 Q. And if it were a cash bond, how
13 would that change your answer?

14 A. Again, I'd need to read the
15 document that governs access to it because
16 there are bonds that you get by touching a
17 button and there are bonds you get by engaging
18 in a fight with somebody over whether you're
19 entitled to it or not. And the two are not in
20 my mind identical in any way.

21 MR. HERTZBERG: We've been going a
22 little over an hour. Let's take a
23 break.

24 (Whereupon, at this time, a short
25 break was taken.)

1 ROBERT M. FISHMAN (1/10/19)

2 BY MR. HERTZBERG:

3 Q. Mr. Fishman, let me call your
4 attention, please, to Goldberg Exhibit 2 and
5 specifically to the line item relating to the
6 motion to dismiss.

7 A. Okay.

8 Q. You reviewed that line item,
9 correct?

10 A. I did.

11 Q. And you deemed it reasonable?

12 A. I did.

13 Q. And in the "Explanation" section,
14 Mr. Goldberg explains that he would, for the
15 briefing, estimate 450 associate hours. Do
16 you see that?

17 A. I see that.

18 Q. Do you have any sense of the
19 methodology behind how Mr. Goldberg arrived at
20 that number?

21 A. No.

22 Q. I'll represent to you that earlier
23 today Mr. Goldberg testified he initially
24 estimated that number to be 480 hours, but he
25 knocked 30 hours off for a particular reason.

1 ROBERT M. FISHMAN (1/10/19)

2 Is this the first time you're hearing that?

3 A. Yes.

4 Q. Mr. Goldberg never told you that he
5 knocked 30 hours off of that number?

6 A. I never talked to Mr. Goldberg.

7 Q. Did anybody ever tell you that he
8 knocked 30 hours off?

9 A. No.

10 Q. Do you know why he knocked 30 hours
11 off?

12 A. No.

13 Q. I want to ask you some questions
14 about the prior litigation that has already
15 taken place between Ambac and Whitebox, on the
16 one hand, and The Bank of New York on the
17 other.

18 A. Okay.

19 Q. Are you aware that there has been
20 litigation between the parties relating to the
21 matters that bring us here today?

22 A. Yes.

23 Q. And what have you reviewed from the
24 Court filings in connection with that
25 litigation?

1 ROBERT M. FISHMAN (1/10/19)

2 A. I looked at the Whitebox complaint.

3 I looked at the Ambac complaint. And I looked
4 at the interpleader action.

5 Q. When you say you looked at the
6 interpleader action, did you look at the
7 interpleader complaint?

8 A. Yes, I'm sorry, the interpleader
9 complaint. That's what I meant to say.

10 Q. The complaint filed by The Bank of
11 New York?

12 A. Right.

13 Q. And are you aware whether there's
14 been any motion practice in the context of the
15 interpleader action?

16 A. I believe there's been some. I'm
17 not sure I can be pre- -- off the top of my
18 head I don't know that I could be precise
19 about exactly what it was.

20 Q. Are you aware there were summary
21 judgment motions filed?

22 A. Yes, I am aware of that.

23 Q. Did you review the summary judgment
24 papers?

25 A. I did not.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. Are you aware that there was
3 discovery among the parties?

4 A. I'm aware that there was some
5 discovery, yes.

6 Q. Are you aware of the volume of the
7 discovery?

8 A. No.

9 Q. Are you aware of whether Bank of
10 New York made requests for production to
11 various parties?

12 A. I believe they did, but I couldn't
13 be specific about to whom or for what.

14 Q. Did you review those requests for
15 production?

16 A. I did not.

17 Q. Are you aware of whether The Bank
18 of New York responded to requests for
19 production from various parties including
20 Ambac?

21 A. I'm not specifically aware one way
22 or the other.

23 Q. Are you aware of whether Bank of
24 New York internally collected documents for
25 the review of its counsel?

1 ROBERT M. FISHMAN (1/10/19)

2 A. I don't know.

3 Q. Are you aware of whether Bank of
4 New York produced documents to other parties?

5 A. I'm not certain.

6 Q. Are you aware of how much time Bank
7 of New York and its counsel spent reviewing
8 document productions made by parties in the
9 interpleader action?

10 A. No.

11 Q. Are you aware of whether Bank of
12 New York performed some case assessment with
13 respect to the Ambac and Whitebox complaints?

14 A. I'm not specifically aware,
15 although I assume they did.

16 Q. Are you aware of how many hours
17 were spent by Reed Smith in connection with
18 that case assessment?

19 A. No.

20 Q. Are you aware of whether Reed Smith
21 has identified legal defense on behalf of the
22 Bank of New York in connection with the events
23 of default alleged by Ambac and Whitebox?

24 A. I'm not specifically aware, no.

25 Q. Are you aware of how many hours

1 ROBERT M. FISHMAN (1/10/19)

2 were spent by Reed Smith in the identification
3 and development of those legal defense?

4 A. No.

5 Q. Are you aware of how many hours
6 were spent by Reed Smith in the drafting of
7 summary judgment papers?

8 A. No.

9 Q. Are you aware of how many hours
10 were spent by Reed Smith in responding to
11 other parties' summary judgment papers?

12 A. I am not.

13 Q. Are you aware of how the Goldberg
14 estimate takes into account all of the work
15 that was performed by Reed Smith on behalf of
16 Bank of New York in the interpleader action?

17 A. Mathematically I'm not aware of it.
18 I know he says he did.

19 Q. Do you know how much Reed Smith has
20 billed to Bank of New York to date in
21 connection with the Ambac and Whitebox
22 actions, including the interpleader
23 litigation?

24 A. No.

25 Q. Have you asked?

1 ROBERT M. FISHMAN (1/10/19)

2 A. No.

3 Q. When assessing the reasonableness
4 of the time and cost estimates of
5 Mr. Goldberg, how did you factor in your own
6 mind the prior work that had been done by
7 Reed Smith on behalf of Bank of New York in
8 connection with the Ambac and Whitebox
9 actions?

10 A. I guess the only thing I could say
11 about that is it's not clear to me the extent
12 to which the anticipated litigation is going
13 to be the same as the existing litigation, be
14 similar to the existing litigation or be
15 completely different than the existing
16 litigation. And, therefore, it's very hard to
17 assign a value to the work that's already been
18 done when you're asked to assign that value in
19 conjunction with a case that you don't know
20 what it's going to say.

21 Q. So in that case, are you
22 effectively, when assessing reasonableness,
23 assuming that Reed Smith is starting from
24 zero?

25 A. No, I don't think I'm assessing it

1 ROBERT M. FISHMAN (1/10/19)

2 that way because I believe Mr. Goldberg made
3 clear that he took into account some benefit
4 of prior knowledge.

5 Q. It's totally unquantified, correct?

6 A. I can't quantify it.

7 Q. Does he quantify it?

8 A. I don't know that he quantifies it
9 in his report. He may or may not be able to
10 quantify it. I don't know that.

11 Q. You don't know whether he
12 quantifies it in his report?

13 A. No, I said I don't believe it is
14 quantified in his report, not in a way I can
15 point to. But he may be capable of
16 quantifying it. I just don't know the answer
17 to the question.

18 Q. You're not capable of quantifying
19 it, correct?

20 A. How he took it into account, no,
21 I'm not capable of quantifying how he took it
22 into account.

23 Q. And you haven't attempted to
24 quantify how he took it into account?

25 A. I have not.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. Mr. Goldberg estimates part of the
3 investment to be made by Reed Smith in the
4 defense of Bank of New York that there would
5 be a number of interviews that would have to
6 be conducted. Do you recall that?

7 A. Yes.

8 Q. Do you recall how many interviews
9 Mr. Goldberg estimated would have to be
10 conducted?

11 A. I don't off the top of my head
12 recall.

13 Q. If I represented to you that it
14 would be 40, would that refresh your
15 recollection?

16 A. I remember 40 is a number relating
17 to depositions, but I'm not sure that it
18 relates to interviews. I don't know if you're
19 meaning to differentiate between interviews
20 and depositions.

21 Q. Let's take depositions. Thank you
22 for the correction. Mr. Goldberg estimates 40
23 depositions. How did you make any assessment
24 of reasonableness as to whether 40 was high,
25 low, just right?

1 ROBERT M. FISHMAN (1/10/19)

2 A. Well, the possibility of there
3 being fraud allegations in the anticipated
4 litigation raises -- to me raises a lot of
5 complicated fact issues. And that means
6 there's a lot of people who may or may not
7 have information relative to the kinds of
8 proofs that you need in a fraud case. And so
9 I don't really find it particularly surprising
10 that someone would estimate that it might take
11 40 people to consider all of the people
12 involved at the Plaintiffs, at the Defendants,
13 at third parties, at governmental entities.
14 That number doesn't really strike me as
15 particularly surprising.

16 Q. A fraud is a material
17 misrepresentation, correct?

18 A. It can be.

19 Q. Okay. A fraud can be committed by
20 a single person, right?

21 A. It's possible for a fraud to be
22 committed by a single person, yes.

23 Q. A fraud can be committed by a
24 single person on the defense side to a single
25 person on the plaintiff side, right?

1 ROBERT M. FISHMAN (1/10/19)

2 A. That is possible, yes.

3 Q. Do you have any reason to believe
4 in this case that if there were a fraud
5 allegation, there would be two witnesses to
6 that fraud, to that act of fraud?

7 A. I do not have any reason to believe
8 that that is specifically true in this
9 instance.

10 Q. You don't know one way or the
11 other?

12 A. I don't. I don't have any idea
13 what the allegations are.

14 Q. The number of witnesses to the
15 fraud could be two, correct?

16 A. Could be.

17 Q. Could be a number greater than two,
18 correct?

19 A. Yes.

20 Q. So how do you make any assessment
21 as to the number of relevant witnesses for
22 deposition is 40?

23 A. Mr. Goldberg makes the assessment
24 that it's 40 and I was asked whether I thought
25 that was an unreasonable assessment or a

1 ROBERT M. FISHMAN (1/10/19)
2 reasonable assessment. And since all I have
3 to work with is the hypothetical of the
4 anticipated case and while I guess it's
5 possible that this fraud is a two-person
6 fraud, I guess it's equally possible that it's
7 a 200-person fraud and 40 therefore seemed
8 like a reasonable number to pick about an
9 unknown fraud alleged to have been done in an
10 unknown way.

11 Q. And because of those unknowns,
12 there's a universe of possibilities as to the
13 numbers of witnesses that could be required to
14 prove the claim of fraud or the defense to
15 fraud, correct?

16 A. I certainly can't tell you how many
17 witnesses it will take to prove and/or defend
18 the unknown claim of fraud.

19 Q. You can't tell me with any degree
20 of certainty how many witnesses there could be
21 to that claim?

22 A. I don't know what the complaint is
23 going to say.

24 Q. So the number 40 is as good an
25 estimate as 20, 60 or a hundred, correct?

1 ROBERT M. FISHMAN (1/10/19)

2 A. No, I don't think I would agree
3 with that.

4 Q. Why not?

5 A. If it said two, I'd be surprised.
6 If it said 200, I'd be even more surprised.
7 And so I'm trying to imagine a hypothetical
8 story. And in a hypothetical story, 40 seems
9 like the kind of number -- if it said 35
10 versus 40, I don't think I would have had any
11 different kind of reaction to it. If it said
12 50 instead of 40, I might not have had a
13 different reaction to it. But if it had said
14 two or three or 200 or 300, I might have had a
15 different reaction to it. But, again, without
16 having an actual complaint to review to see
17 actual allegations about who did what to who,
18 it's impossible to have an actual right
19 answer. I guess that's why it's an estimate.

20 Q. I may be in a position to pass the
21 witness I'm just taking a last look,
22 particularly a look at paragraph 69, please,
23 of the Goldberg.

24 A. Okay.

25 Q. Mr. Goldberg states in paragraph

1 ROBERT M. FISHMAN (1/10/19)

2 69, "The trial counsel may have to analyze
3 certain legal and factual issues, including
4 jurisdiction, standing, venue, removal,
5 sufficiency of process, et cetera." Do you
6 see that?

7 A. I do.

8 Q. Did you form any opinion as to
9 whether those were viable issues to be
10 addressed in the anticipated litigation or did
11 you rely entirely on Mr. Goldberg's
12 assessment?

13 A. Well, I would say I mostly relied
14 on his assessment, but I did give some
15 consideration to where is the case being filed
16 and who's filing it and are there issues that
17 can challenge their right to file it in a
18 place or their right to file it at all. And
19 while I don't know enough about the underlying
20 dispute to say that I have an opinion that
21 those issues are, in fact, present, I don't --
22 I certainly don't have any problem imagining
23 the possibility of those kinds of issues
24 arising in the context of this litigation.

25 Q. So did you make a determination

1 ROBERT M. FISHMAN (1/10/19)

2 that standing could be an issue in the -- in
3 the anticipated litigation?

4 A. I did not make an independent
5 determination that standing was an issue, but
6 in the context of preparing the report, I saw
7 and/or spoke about that as a possible issue.

8 Q. You spoke about that with who?

9 A. With counsel.

10 Q. At Reed Smith?

11 A. Yes.

12 Q. You had a conversation with
13 Reed Smith about standing?

14 A. Not specifically about the merits
15 of standing, but about the identification of
16 issues that could arise.

17 Q. Did you make an assessment that
18 standing -- and I'm just taking an example
19 from paragraph 69, that standing is an issue
20 that could arise in the anticipated
21 litigation?

22 A. I didn't make an independent
23 assessment that there are grounds for a
24 standing dispute. I made an assessment that
25 it is possible that that issue could arise.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. About what fact did you make that
3 assessment that that issue could arise?

4 A. I was just told that it could
5 arise.

6 Q. You were told that; you didn't make
7 an assessment of it?

8 A. I said I did not make an
9 independent assessment of whether there's a
10 valid standing argument. I was advised that
11 there might be a standing argument.

12 Q. And Reed Smith advised you of that?

13 A. Yes.

14 Q. What about venue, did you make an
15 independent assessment as to whether there are
16 venue issues in the anticipated litigation?

17 A. Where is the anticipated litigation
18 filed? Because I can't really direct myself
19 to venue if I don't know where it's filed,
20 which is the only way I could know if maybe it
21 should have been filed somewhere else.

22 Q. What about sufficiency of process,
23 is that --

24 A. I don't think I -- I don't think I
25 gave particular consideration to that issue.

1 ROBERT M. FISHMAN (1/10/19)

2 I don't recall. I don't recall it.

3 Q. What about jurisdiction, did you
4 make any assessment as to whether jurisdiction
5 was an issue that would require analysis in
6 the anticipated litigation?

7 A. I didn't make my own analysis of
8 that, no. I can imagine jurisdiction as a
9 potential issue depending on who files what
10 where. What Court they're asking to address
11 it and I can imagine that some Courts have the
12 right to address that issue and other Courts
13 might not have the right to address that
14 issue, or at least an argument could be made
15 that they don't.

16 MR. HERTZBERG: All right. I'll
17 pass the witness. Thank you.

18 THE WITNESS: You almost did
19 something I've never seen before. You
20 said you might pass the witness and
21 you did it without asking another
22 question, which never happens.

23 EXAMINATION BY

24 MR. WELCH:

25 Q. Good afternoon. My name is

1 ROBERT M. FISHMAN (1/10/19)

2 Trevor Welch with Kasowitz Benson for
3 Whitebox.

4 You said you were retained in
5 December?

6 A. Yes.

7 Q. And you received a draft of
8 Mr. Goldberg's declaration sometime in
9 December?

10 A. Yes.

11 Q. Was it different from the final one
12 that has been filed in this case?

13 A. Yes, it was somewhat different.

14 Q. Did you give any pushback or
15 comments on Mr. Goldberg's draft declaration?

16 A. No, I did not.

17 Q. Did you in any way communicate with
18 Mr. Goldberg in your review of the draft
19 declaration?

20 A. No, I did not.

21 Q. What purpose were you given a draft
22 declaration?

23 A. I'm not sure what the purpose was.
24 I guess to give me a running start at what he
25 might be saying so that I could get a running

1 ROBERT M. FISHMAN (1/10/19)

2 start on what I might be saying.

3 Q. And you indicated that you began
4 drafting your report before you had even
5 gotten Mr. Goldberg's declaration; is that
6 right?

7 A. Before I got the final one, yes.

8 Q. And then you get the declaration,
9 and then what, what did you do?

10 A. Well, those days all run into each
11 other. I'm not sure that I could specifically
12 tell you what day I did which thing when we're
13 talking about a total of about ten days in
14 which I did a lot of things. I'm not sure.
15 I'm not sure I can -- I'm not sure I can
16 really give you a meaningful answer to that.

17 Q. You use the figure "ten," ten days?

18 A. I made up ten days. It might have
19 been 12, 13, it might have been nine. All I
20 know is I spent two weeks in Florida on a
21 vacation in which I didn't do very much
22 vacationing.

23 Q. Instead what you focused on was
24 crafting your expert report in this case?

25 A. That was the lion's share of the

1 ROBERT M. FISHMAN (1/10/19)

2 work that I did when I was supposed to be on
3 vacation, yes.

4 Q. Well, I want to understand what the
5 work is that you did?

6 A. Okay.

7 Q. You read Mr. Goldberg's report?

8 A. That's one of the things that I
9 did.

10 Q. What else did you do?

11 A. I read a variety of pleadings that
12 were sent to me. I read some Court orders. I
13 read some plan provisions. That probably is a
14 pretty fair description of what I looked at.

15 Q. What did you do that the Court
16 can't do for itself?

17 A. What did I do that the Court can't
18 do for itself? I don't know what the Court
19 can do for itself. I guess I don't know how
20 to answer that question.

21 Q. You intend to offer an expert
22 opinion in this matter?

23 A. I think that's the intent, yes.

24 Q. Do you believe your opinion will
25 assist the Court as the trier of fact in

1 ROBERT M. FISHMAN (1/10/19)

2 making certain determinations in the matter?

3 A. I certainly believe it has the
4 possibility of assisting the Court. I guess
5 the Court will have to decide if it's of any
6 assistance.

7 Q. What's the assistance you imagine
8 your report will give the Court?

9 A. A reflection on the reasonableness
10 of the assessment of the potential costs and
11 the protections that are afforded to the
12 Plaintiffs under that scenario.

13 Q. But you didn't do any independent
14 assessment of those issues, right?

15 A. I didn't do an independent
16 assessment of the costs. I relied on
17 Mr. Goldberg's assessment and I looked at it
18 to determine if I thought it was reasonable.

19 Q. Okay. So you did an assessment of
20 Mr. Goldberg's assessment?

21 A. In a manner of speaking.

22 Q. Anything else?

23 A. Well, I -- Mr. Goldberg's
24 assessment isn't -- I didn't rely on
25 Mr. Goldberg's assessment in discussing the

1 ROBERT M. FISHMAN (1/10/19)
2 protections that would be available to the
3 Plaintiffs in the event that the reserve fund
4 is funded and an amount of money is put in it
5 that exceeds the amount of the fees that are
6 ultimately allowed to -- using the word
7 "allowed" loosely, allowed to with The Bank of
8 New York.

9 Q. Okay. Do you think that the Court
10 is capable of evaluating Mr. Goldberg's
11 assessment of the potential fees in this case?

12 A. I don't really have an opinion
13 about what the Court is capable of doing.

14 Q. What is it that you think you've
15 done that the Court can't do by simply reading
16 Mr. Goldberg's declaration?

17 A. Well, I didn't say that I did
18 something that the Court can't do. I imagine
19 that the Court might be interested in someone
20 who is familiar with and has experience in
21 looking at fees in the context of insolvency
22 cases and expressing an opinion about the
23 topic. And if the Court doesn't find it
24 helpful, then the Court won't pay attention to
25 it.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. You don't have experience in doing
3 estimates, do you, sir?

4 A. I don't have experience in doing an
5 estimate of fees for this case or a case
6 exactly like this, no, I don't.

7 Q. How about any case?

8 A. Sure, I've done lots of budgets in
9 my career.

10 Q. You made a distinction between
11 looking at pre-performance estimates and
12 post-performance analysis?

13 A. Those are two different things, but
14 that's not the same as doing a budget.

15 Q. So here do you agree with me what
16 Mr. Goldberg has done is a pre-performance
17 estimate of fees?

18 A. I certainly agree with that.

19 Q. And what you as a fee examiner have
20 done professionally is a post-performance
21 analysis of actually billed fees?

22 A. That is certainly one of the things
23 I have done as a fee examiner.

24 Q. So what, if anything, have you done
25 that qualifies you to evaluate Mr. Goldberg's

1 ROBERT M. FISHMAN (1/10/19)

2 pre-performance estimate of fees?

3 A. For instance in the Petters' case,
4 we use budgets in the Petters' case and did
5 from 2016 through the current time period.
6 And every professional submits to me a
7 quarterly budget that sets forth their best
8 guess about what they're going to do for the
9 next quarter going forward. So I have looked
10 at many budgets in that context.

11 I have prepared my own budgets for
12 litigation over time, including as recently as
13 submitting budgets in the Toys "R" Us case
14 because the U.S. Trustee guidelines require
15 that. So I have -- I have some familiarity
16 with the concept of trying to project what
17 litigation is going to look like or what legal
18 proceedings is going to look like. It isn't
19 always litigation.

20 Q. Some familiarity. What else
21 besides what you've just described? What
22 other experience do you have?

23 A. I'd be hard pressed to list the
24 name of every case I ever submitted a budget
25 for, but there's more than a few.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. Well, can you quantify; five?

3 A. More than five.

4 Q. Any cases comparable to this?

5 A. No, I don't think I have ever
6 myself handled a piece of litigation
7 comparable to this. It's not what I do.

8 Q. Your opinion is wholly derivative;
9 isn't that true?

10 A. No, I don't think it is.

11 Q. If Mr. Goldberg's opinion was
12 stripped out of this case, let's imagine there
13 was no declaration being submitted by
14 Mr. Goldberg, what could you offer the Court?

15 A. Well, I wouldn't be able to create
16 the assessment that Mr. Goldberg has created
17 for the entirety of the case because I don't
18 have a level of familiarity with handling that
19 kind of litigation. That's why I was asked to
20 make assumptions based on what he produced.

21 Q. So it's something you're not
22 capable of doing?

23 A. That particular thing I would not
24 be able to do on my own. I probably, given
25 enough time, could have collected up a group

1 ROBERT M. FISHMAN (1/10/19)

2 of people and done that assessment, but I
3 didn't have enough time to do that and
4 therefore wasn't a choice.

5 Q. So you didn't do that?

6 A. I absolutely didn't do that.

7 Q. So apart from reviewing
8 Mr. Goldberg's opinion and opining that you
9 think it was reasonable, based on the
10 experience you've described, what is it that
11 you did to offer your opinion?

12 A. I also provided my view on the
13 reasons why the reserve fund approach was a
14 reasonable approach to protect the interests
15 of all of the litigants.

16 Q. Okay. Anything else?

17 A. No, not so much. I think that's, I
18 think, the two principal things that I
19 expressed an opinion about.

20 Q. You expressed an opinion on the
21 reasonableness of Mr. Goldberg's opinion?

22 A. Of his assessment.

23 Q. So you did an assessment of his
24 assessment?

25 A. You could call it that I guess.

1 ROBERT M. FISHMAN (1/10/19)

2 Q. An assessment that you don't have
3 an independent basis to make?

4 A. I would not be making an
5 independent assessment of the management of
6 the litigation of this sort.

7 Q. Right, because you don't have the
8 experience to do that?

9 A. I don't, although I do have the
10 experience to read other people's assessments
11 of their cases because I do that all the time
12 as a fee examiner.

13 Q. I'm sure the Court does as well.

14 A. I have no idea what the Court does.

15 Q. So I want to talk about the
16 protections that you referred to, which is the
17 only independent opinion that you intend to
18 offer in this case; is that right?

19 A. Those are your words. I don't
20 know. I'm not sure I'd say it that way.

21 Q. How would you say it?

22 A. I'd say I offered opinions on
23 Mr. Goldberg's assessment and on the
24 protections.

25 Q. Okay. And apart from that,

1 ROBERT M. FISHMAN (1/10/19)

2 anything else?

3 A. I don't think so.

4 Q. What's the nature of your opinion
5 concerning the protections?

6 A. That Bank of New York Mellon would
7 refund any amount in excess of fees that it
8 was ultimately entitled to take. Number two,
9 that the budgeting process and the reserve
10 funds does not in any way infringe on the
11 right of parties to challenge the
12 reasonableness of the fees. And number three,
13 to the extent that there ever was a
14 determination that the conduct of the bank was
15 such that it should not be entitled to fees
16 and if that was successfully prosecuted to
17 conclusion, that that protection wasn't being
18 taken away either. In all those instances
19 there would still be a prospect for the
20 Plaintiffs to affect the amount of fees that
21 the Defendant was entitled to receive.

22 Q. And how did you reach those
23 conclusions?

24 A. Well, number one, my understanding
25 is that Bank of New York has agreed to give

1 ROBERT M. FISHMAN (1/10/19)

2 back any excess amounts that are withheld. So
3 my understanding comes from them saying that's
4 what they're going to do. Number two, I
5 understand that there is an opportunity to
6 review and object to the fees at an
7 appropriate time as being reasonable because I
8 think this comes from the contractual
9 relationship. And number three, as just as a
10 matter of law, there are certain conduct,
11 which if you were able to successfully prove
12 they were engaged in you'd have the
13 opportunity to argue that that deprives a
14 party of the right to receive fees.

15 Q. So it sounds to me that you made
16 some factual assumptions and applied a legal
17 analysis; is that fair?

18 A. I don't think I applied a legal
19 analysis. I think I applied a factual
20 analysis.

21 Q. As a matter of law, what were you
22 referring to?

23 A. I believe -- and I'm not -- I'm not
24 expressing an opinion about what law would
25 apply or how it would apply. Again, we're

1 ROBERT M. FISHMAN (1/10/19)
2 talking about a hypothetical case. But I
3 believe there are circumstances in which a
4 Court could conclude that a party has lost its
5 right to have its fees reimbursed based on its
6 conduct. And someone would have to allege
7 that, and someone would have to prove that and
8 a Court have to find that and you might be in
9 a position to make that argument.

10 Q. Are you familiar with Section 19.5
11 in the plan?

12 A. I am.

13 Q. Are you offering an opinion on the
14 meaning of Section 19.5 in this case?

15 A. The meaning of it?

16 Q. Yes.

17 A. I don't know what you're asking me
18 about when you ask that question.

19 Q. Well, let me ask a very open-ended
20 question. What, if anything, do you have to
21 say about Section 19.5 within the confines of
22 the expert opinion that you intend to offer in
23 this case?

24 A. Well, I mean, it says what it says.
25 And so there's really no opinions to be

1 ROBERT M. FISHMAN (1/10/19)
2 offered about the words that are there. It
3 appears to create the Court's right to
4 determine if one of the two sets of
5 protections are appropriate; and if they are,
6 to establish what they would be.

7 Q. It appears that's just --

8 A. That's what I think Section 19.5
9 says.

10 Q. That's how you read it?

11 A. That's what I think it says.

12 Q. And you'd agree that the Court is
13 capable of reading 19.5 as well, right?

14 A. I'm sure the Court is capable of
15 reading 19.5.

16 Q. In evaluating as a matter of law
17 what it means?

18 A. I assume the Court is ultimately
19 going to do that regardless who it hears from
20 on the topic.

21 Q. Do you have any factual knowledge
22 with respect to the negotiation of
23 Section 19.5?

24 A. None whatsoever.

25 MR. WELCH: I have no further

1 ROBERT M. FISHMAN (1/10/19)

2 questions.

3 EXAMINATION BY

4 MR. HERTZBERG:

5 Q. Just a follow-up to Mr. Welch.

6 Paragraph 41 of your declaration.

7 A. Yeah.

8 Q. You offer the opinion that "In the
9 event that Whitebox and/or Ambac are
10 ultimately successful on the merits of the
11 anticipated litigation, Whitebox and/or Ambac
12 could thereafter elect to seek a judicial
13 determination that BNYM's conduct was such
14 that BNYM should not as a matter of public
15 policy be entitled to retain its fees and
16 expenses." Do you see that?

17 A. I do.

18 Q. You understand that the only claims
19 of Ambac and Whitebox that survived the claim
20 are claims for gross negligence, willful
21 misconduct and intentional fraud, correct?

22 A. Yes. Yes.

23 Q. If Whitebox or Ambac are successful
24 on any of those claims, is there any scenario
25 that you're aware of by which BNYM could

1 ROBERT M. FISHMAN (1/10/19)

2 retain its fees and expenses?

3 A. I would say I'm not aware that
4 there is one and I'm not aware that there
5 isn't one.

6 Q. So then it puzzles me that you say
7 that after succeeding on the merits, Whitebox
8 and/or Ambac could thereafter then seek a
9 determination?

10 A. Right.

11 Q. Isn't the success on the merits the
12 determination that Whitebox and Ambac need to
13 establish that BNYM isn't entitled to its fee?

14 A. If I knew what the Complaint said,
15 I might be able to answer your questions. But
16 since I don't know what the Complaint is going
17 to allege, what it's going to seek, what
18 you're going to be able to prove and what a
19 Court is ultimately going to decide, I really
20 have no way of knowing if it is automatic that
21 you would get that or if you would merely have
22 the right to try to get that.

23 Q. You do know the Complaints that
24 survive the plan can only allege gross
25 negligence or more serious conduct, correct?

1 ROBERT M. FISHMAN (1/10/19)

2 A. Well, I know that gross negligence,
3 willful misconduct and intentional fraud are
4 the description of what survived.

5 Q. And if Whitebox and/or Ambac
6 prevail on any of those three causes of
7 action, BNYM is not, as a matter of public
8 policy, entitled to retain its fees, correct?

9 A. I'm not sure if that's correct or
10 not.

11 Q. Under what scenario could Bank of
12 New York be found grossly negligent or to have
13 engaged in willful misconduct or intentional
14 fraud and still be able to retain its fees and
15 expenses?

16 A. I don't know the answer to that
17 question.

18 Q. You can't identify one?

19 A. I don't know the answer to that
20 question.

21 MR. HERTZBERG: Thank you, sir.

22 (Time noted: 3:52 p.m.)

23

24

25

Page 98

1 ROBERT M. FISHMAN (1/10/19)
2
3 J U R A T
4
5

6 I, ROBERT M. FISHMAN, ESQ., do
7 hereby certify under penalty of
8 perjury that I have read the foregoing
9 transcript of my deposition taken on
10 January 10, 2019; that I have made
11 such corrections as appear noted
12 herein in ink, initialed by me; that
13 my testimony as contained herein, as
14 corrected, is true and correct.
15
16

17 ROBERT M. FISHMAN, ESQ.
18
19

20 Subscribed and sworn to before me
21

22 This _____ day of _____, 2019.
23

24 NOTARY PUBLIC
25

Page 99

1 ROBERT M. FISHMAN (1/10/19)

2 -----I N D E X-----

3 WITNESS: ROBERT M. FISHMAN, ESQ.

4 EXAMINATION BY	PAGE
5 MR. HERTZBERG	5, 95
6 MR. WELCH	80

7

8

9

10

11 -----E X H I B I T S-----

12 FISHMAN EXHIBIT	FOR I.D.
13 Fishman Exhibit 1,	8
14 Declaration of Robert M. Fishman	

15

16

17

18

19

20

21

22

23

24

25

Page 100

1 ROBERT M. FISHMAN (1/10/19)

2 C E R T I F I C A T E

3

4 STATE OF NEW YORK)

: SS.:

5 COUNTY OF RICHMOND)

6

7 I, AYLETTE GONZALEZ, a Notary Public
8 for and within the State of New York, do
9 hereby certify:

10 That the witness, ROBERT M. FISHMAN,
11 ESQ., whose examination is hereinbefore set
12 forth was duly sworn and that such
13 examination is a true record of the testimony
14 given by that witness.

15 I further certify that I am not
16 related to any of the parties to this action
17 by blood or by marriage and that I am in no
18 way interested in the outcome of this matter.

19 IN WITNESS WHEREOF, I have hereunto
20 set my hand this 10th day of January, 2019.

21 
22

23 AYLETTE GONZALEZ

24

25

Page 101

1 ROBERT M. FISHMAN (1/10/19)

2 ERRATA SHEET FOR THE TRANSCRIPT OF:

3 Case Name: In re: The Financial Oversight
and Mgmt Board for Puerto Rico

4 Dep. Date: January 10, 2019

5 Deponent: ROBERT M. FISHMAN, ESQ.

6 Pg. Ln. Now Reads Should Read Reason

7	_____	_____	_____
8	_____	_____	_____
9	_____	_____	_____
10	_____	_____	_____
11	_____	_____	_____
12	_____	_____	_____
13	_____	_____	_____
14	_____	_____	_____
15	_____	_____	_____
16	_____	_____	_____
17	_____	_____	_____
18	_____	_____	_____
19	_____	_____	_____
20	_____	_____	_____

21 ROBERT M. FISHMAN, ESQ.

22 SUBSCRIBED AND SWORN BEFORE ME,

23 This ____ day of _____, 2019.

24 _____ Notary Public

25 My Commission Expires: _____